

## COMMENT

### **ANDERSON-BURDICK, DEMOCRACY, AND TRADITION IN THE REPUBLIC OF PALAU**

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Over 7,000 miles west of Hawaii, a Pacific Island nation of roughly 20,000 people attempts to balance modern democracy and cultural identity. A former U.S. trusteeship, the Republic of Palau gained independence barely thirty years ago. The indigenous Palauans, however, have inhabited the archipelago for millennia. Drawing on its colonial past, the Republic's founders structured a state governed by democratic principles and non-democratic customary law. Within this structure, three groups wield political power: the elected officials, the appointed judges, and the unelected traditional leaders. Three constitutional rules bind this structure: First, all governments within the nation must follow democratic and traditional principles. Second, under democratic principles, the elected officials have the powers to appoint the judges and to grant or deny the traditional leaders' authority. Third, under traditional principles, only traditional leaders may appoint traditional leaders.

Shortly after independence, the judges faced a problem: elected officials attempting to appoint traditional leaders. The attempts were a response to another problem—traditional leaders neglecting their constitutional duties to resolve appointment disputes. Responding to vacancies among the traditional leaders, the elected officials passed laws allowing them to directly appoint an individual and indirectly acknowledge a candidate as the appointed traditional leader. Both problems persist.

The Palau Supreme Court responded with conflicting holdings. Under *Ngardmau Traditional Chiefs* and *Ngara-Irrai*, the elected officials cannot appoint traditional leaders. However, under *Obeketang*, they may do so indirectly through their Sole Judge Clause powers. This Comment explains the problems with these decisions and argues that an alternative framework is needed for future litigants. That framework calls for an interest-weighting procedure analogous to the *Anderson-Burdick* doctrine.

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#### INTRODUCTION

Democracy is a remnant of colonial oppression; it is alien to indigenous communities and threatens what little tradition remains. This is one view of Western democracy's introduction to Pacific Island nations.<sup>1</sup> Another view holds that democracy has always existed in these indigenous communities but the Western notion of democracy is incompatible with the indigenous notion.<sup>2</sup> Both respond to the question, Can Western democracy coexist with Pacific Islander traditions?

To frame the debate, consider a state gaining independence in the late twentieth century. The state ratifies a constitution establishing a representative democracy. Reflecting on its colonial experience, the state empowers two political institutions—a legislature and an indigenous traditional council. Under the constitution, the state's citizenry elects its legislators by majority vote. In contrast, the traditional council's members are chosen by a class of citizens defined by indigenous traditions. To ensure these two institutions coexist, the constitution requires all governments within the state to comply with both democratic and traditional indigenous principles.

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1. STEPHANIE LAWSON, TRADITION VERSUS DEMOCRACY IN THE SOUTH PACIFIC: FIJI, TONGA AND WESTERN SAMOA 169 (John Ravenhill ed., 1996).

2. *Id.* at 168–69.

Now suppose the traditional council fails to execute its constitutional duties because of vacancies on the council. Because the traditional council fails to execute those duties, legislation grinds to a halt, infighting grows, and pertinent issues are left unaddressed—all problems needlessly distracting elected officials from civil service. Can the legislature empower either itself or the executive branch to fill those vacancies by selecting council members of its choosing?

The Supreme Court of the Republic of Palau returns two different answers. Under its decisions *Ngardmau Traditional Chiefs v. Ngardmau State Government*<sup>3</sup> and *Ngara-Irrai Traditional Council of Chiefs v. Airai State Government*,<sup>4</sup> the answer is no, legislatures may not do so. However, under *Obeketang v. Sato*,<sup>5</sup> because the court has no authority to answer the question, as a practical matter, legislatures may do so. These two answers are incompatible. They do not present a clear framework for determining whether vacancies in a traditional council can be filled by elected officials.

This Comment argues that the Palau Supreme Court's two holdings are individually and jointly problematic and that a framework analogous to the *Anderson-Burdick* doctrine is needed to answer the question. Part I of this Comment provides the background information underlying the Palau Supreme Court's two inconsistent holdings. Part II analyzes the problems with these holdings, concluding that the two holdings, read individually and jointly, do not provide clear rules for future litigants. Part III responds to this failure by presenting an interest-weighting framework, analogous to the *Anderson-Burdick* doctrine, with applications to fact patterns. This Comment then concludes with an appraisal of the analogous framework, considering Palau's increasingly globalized economy.

## I. PALAUAN LAW AND CUSTOMS

Because Palauan law and customs are not widely known, this Part presents the underlying facts and law behind the problem. First, this Part provides a brief introduction to the Palauan political framework. Second, in light of that political framework, this Part considers the problem of a legislature enacting a law that violates Palauan tradition. Finally, this Part explains the Palau Supreme Court's two different responses to the problem.

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3. 6 ROP Intrm. 192, 192–93 (App. Div. 1997).

4. 6 ROP Intrm. 198, 199, 201–02 (App. Div. 1997).

5. 13 ROP 192, 193, 199 (App. Div. 2006).

*A. The Modern Palauan Political Framework*

The Republic of Palau is a microstate in the Western Pacific.<sup>6</sup> The nation has been independent only since 1994.<sup>7</sup> Before independence, it was a United Nations Trust Territory<sup>8</sup> administered by the United States.<sup>9</sup> Before American administration, the country experienced several colonial regimes: first the Spanish, then the Germans, and finally the Japanese.<sup>10</sup>

Despite its recent colonial past, Palau remains home to an indigenous people, Palauans, who have inhabited the archipelago for several thousand years.<sup>11</sup> Palauans form most of the country's population,<sup>12</sup> and like many other Pacific Islanders, they have preserved their traditions and language through oral history.<sup>13</sup>

Palau's modern government is nearly an exact replica of the United States' government.<sup>14</sup> The country is divided into sixteen states, each with its own state government.<sup>15</sup> These states are governed by a national government.<sup>16</sup> The national government is divided into three branches: the legislature, executive, and judiciary.<sup>17</sup> The state governments, however, are divided into only two branches, the legislative and the executive,<sup>18</sup> as the constitution mandates one judiciary for the entire country.<sup>19</sup>

6. Wouter Veenendaal, *Political Representation in Microstates: St. Kitts and Nevis, Seychelles, and Palau*, 45 COMPAR. POL. 437, 443 (2013).

7. *Id.* at 449.

8. The United Nations Trust Territories were the Pacific islands formerly possessed by Japan from 1914 to 1947, when the United Nations transferred its administration to the United States at the end of the Second World War. See James Robert Arnett, II, Comment, *The American Legal System and Micronesian Customary Law: The Legal Legacy of the United States to the New Nations of the Trust Territory of the Pacific Islands*, 4 UCLA PAC. BASIN L.J. 161, 163 (1985).

9. Veenendaal, *supra* note 6, at 449.

10. Antonio L. Cortés, *Land in Trust: The Invasion of Palau's Land-Tenure Customs by American Law*, 14 ASIAN-PAC. L. & POL'Y J. 167, 168 (2013).

11. Geoffrey R. Clark, *A 3000-Year Culture Sequence from Palau, Western Micronesia*, 44 ASIAN PERSP. 349, 371 (2005).

12. 1 OFF. OF PLAN. & STAT., BUREAU OF BUDGET & PLAN., 2015 CENSUS OF POPULATION HOUSING AND AGRICULTURE FOR THE REPUBLIC OF PALAU 12 (2015).

13. Sunny Ngirmang, *Collection and Inventory of Oral History at the National Level in Palau*, 22 ICH COURIER 10, 10–11 (2014).

14. Veenendaal, *supra* note 6, at 449.

15. *Id.*

16. *See id.*

17. See Kevin Bennardo, *The Rights and Liberties of the Palau Constitution*, 12 ASIAN-PAC. L. & POL'Y J. 1, 4 (2011).

18. Veenendaal, *supra* note 6, at 449.

19. ROP CONST. art. X, § 1.

## 1. THE TRADITIONAL PALAUAN POLITICAL FRAMEWORK

In addition to the power granted to their respective branches, the national and state governments provide some political power to traditional councils and their members.<sup>20</sup> These councils governed the islands before colonization.<sup>21</sup> The councils' powers vary by state and by each member's rank. At the national level, the national traditional council holds a purely advisory role to the president.<sup>22</sup> At the state level, traditional councils hold powers ranging from minimal (e.g., advising the legislature) to extraordinary (e.g., lawmaking and government leadership).<sup>23</sup> All traditional council members, moreover, continue to hold their historic authority over matters of tradition and custom.<sup>24</sup> Higher-ranking council members wield greater authority than lower-ranking members and, therefore, hold greater authority in their respective states.<sup>25</sup>

Palau, like the United States, is a common-law jurisdiction, employing an adjudicatory framework premised on *stare decisis*.<sup>26</sup> A point of departure, however, is that Palauan common law imports two bodies of law. One body of law is American common law, which is considered highly persuasive where novel legal issues arise.<sup>27</sup> Once a Palauan court relies on a holding from an American court to decide an issue, the American court's holding becomes a part of Palauan common law, and subsequent litigants cite to the Palauan holding.<sup>28</sup> The second body of law consists of laws imported from Palauan traditions.<sup>29</sup> These traditions include the traditional rules that historically governed Palauan society.<sup>30</sup> The traditional rules become law when a Palauan court, in its written opinion, holds that such rules control an issue's resolution.<sup>31</sup> Cultural

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20. Arthur Ngiraklsong, *A Workable Balance Between Democratic Principles and Principles of Palauan Traditional Governance in State Constitutions: What Fails and What Succeeds?*, 35 U. HAW. L. REV. 909, 917–20 (2013).

21. *Id.* at 909–10.

22. ROP CONST. art. VIII, § 6.

23. Donald R. Shuster, *Custom Versus a New Élite: Palau's 16 State Constitutions*, 29 J. PAC. HIST. 188, 190–91 (1994).

24. Ngiraklsong, *supra* note 20, at 917; ROP CONST. art. V, § 1.

25. PALAU SOC'Y OF HISTORIANS, MICRONESIAN RESOURCES STUDY: PALAU ETHNOGRAPHY 13 (1997).

26. NAT. RES. L. CTR., UNIV. OF COLO. SCH. OF L., PRIVATE LANDS CONSERVATION IN PALAU 10 (2004).

27. 1 PALAU NAT'L CODE ANN. § 303.

28. *See id.*

29. *See id.* § 304.

30. *Id.* § 302.

31. *Beouch v. Sasao*, 20 ROP 41, 48–49 (App. Div. 2013).

practices, alongside traditional rules, create the traditional Palauan political framework.<sup>32</sup>

The traditional political framework is structured as a hierarchy built upon varying social units. In Palauan society, the broadest social unit is the clan.<sup>33</sup> Each clan consists of houses—a grouping of nuclear families.<sup>34</sup> As a whole, the clan is governed by two matrilineal descendants (usually) of a house within the clan: a chief and his female counterpart, a chieftess.<sup>35</sup> Every clan has a unique title for its chief and chieftess,<sup>36</sup> who are described as “holding title.”<sup>37</sup>

These two titleholders are selected by their clan’s *ourrot*, the “senior strong members” of the clan.<sup>38</sup> Senior strong members are the clan’s eldest women who are (a) matrilineally descended from the clan and (b) designated as matriarchs because of their contributions to the clan’s affairs.<sup>39</sup> When a clan’s chief or chieftess dies, abdicates, or is removed, the clan’s *ourrot* begin the process of choosing a new titleholder.<sup>40</sup> The *ourrot* convene and deliberate over candidates, who are almost always matrilineal descendants of the clan.<sup>41</sup> Once the *ourrot* have chosen, the highest-ranking *ourrot* (usually the clan’s chieftess) appoints the candidate.<sup>42</sup> The appointment must then be approved by the village traditional council, the *klobak*.<sup>43</sup> If the council disapproves, the *ourrot* start the process anew.<sup>44</sup> If the council approves, however, the *ourrot*’s choice is final and not subject to outside review.<sup>45</sup> This selection process is a tradition common across all Palauan clans and has been recognized as traditional law.<sup>46</sup>

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32. See Roland W. Force, *Leadership and Cultural Change in Palau*, 50 FIELDIANA 1, 32, 36–40 (1960).

33. *Id.* at 34, 44–45.

34. *Id.* at 45.

35. See 3 AUGUSTIN KRÄMER, RESULTS OF THE SOUTH SEAS EXPEDITION 1908-1910, at 278 (Audrey Weinland trans., Krämer Ethnography Translation Comm. 2017) (1926); see also 2 *id.* at 4 (Carmen C.H. Petrosian-Husa trans.) (1919).

36. See 3 *id.* at 280–81; see also 2 *id.* at 4.

37. *Arbedul v. Diaz*, 9 ROP 218, 219, 224, 226 (Trial Div. 1989).

38. *Uehara v. Obeketang*, 1 ROP Intrm. 267, 269 (Trial Div. 1985); *Espangel v. Diaz*, 3 ROP Intrm. 240, 243–44 (App. Div. 1992); Force, *supra* note 32, at 40.

39. *Ngirmang v. Filibert*, 9 ROP 226, 229 (Trial Div. 1998).

40. *Edward v. Suzuky*, 19 ROP 187, 188–89 (App. Div. 2012).

41. *Uehara*, 1 ROP Intrm. at 269.

42. *Arbedul*, 9 ROP at 224.

43. *Uehara*, 1 ROP Intrm. at 269; PALAU SOC’Y OF HISTORIANS, *supra* note 25, at 1.

44. PALAU SOC’Y OF HISTORIANS, *supra* note 25, at 1; see also *Uehara*, 1 ROP Intrm. at 269–70.

45. *Matlab v. Melimarang*, 9 ROP 93, 97 (App. Div. 2002). “Outside review” means anyone other than the *ourrot*.

46. *Uehara*, 1 ROP Intrm. at 269; *Espangel v. Diaz*, 3 ROP Intrm. 240, 243–44 (App. Div. 1992).

The chiefs and chieftesses of each clan collectively form traditional councils.<sup>47</sup> These traditional councils exist at multiple political subdivisions. As mentioned earlier, Palau is divided into sixteen states. Within each of these states are villages, and within each village, there are a certain number of clans.<sup>48</sup> The number of clans varies by village; some villages have as few as four, others as many as twenty.<sup>49</sup> Regardless of quantity, the clans are ranked from highest to lowest.<sup>50</sup> The chief and chieftess from each of the clans form the village's two traditional councils.<sup>51</sup> One traditional council is formed by the chieftesses and the other by the chiefs.<sup>52</sup> Within these traditional councils, the chiefs and chieftesses are ranked according to their clan rank.<sup>53</sup> Finally, the highest-ranked chief and chieftess from each of the village traditional councils within the state form the state traditional council.<sup>54</sup> This formation of traditional councils is a tradition common throughout all of Palau's sixteen states.<sup>55</sup> Such councils were Palau's historic form of government before colonial administration.<sup>56</sup>

Because the members of a traditional council are council members only by virtue of holding their respective clan's title, a member of the traditional council must be chosen by their clan's *ourrot*. To clarify this deduction, examine the conclusion's contrapositive. If a person is not approved by their clan's *ourrot*, then they do not have title. If they do not have title, then they cannot be members of the traditional council. This process for electing traditional council members is supported by the Palau Constitution.<sup>57</sup> For the remainder of this Comment, this is referred to as the "*ourrot* selection rule." This rule is violated when a legislature empowers either itself or the executive branch to select members of its traditional council.

While much of their former authority has diminished, the customary roles of traditional councils and their members are protected by both Palau's national constitution and the sixteen state constitutions.<sup>58</sup> Under the national constitution, neither national nor state government can

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47. Force, *supra* note 32, at 36.

48. KRÄMER, *supra* note 35, at 4.

49. Force, *supra* note 32, at 37; Shuster, *supra* note 23, at 190–91.

50. Force, *supra* note 32, at 36–37.

51. *Id.* at 36–40.

52. *Id.*

53. *Id.*

54. See Shuster, *supra* note 23, at 193–97.

55. Ngiraklsong, *supra* note 20, at 909–10; ROP CONST. art. V, § 1; KRÄMER, *supra* note 35, at 4.

56. Ngiraklsong, *supra* note 20, at 909–10.

57. ROP CONST. art. VIII, § 6.

58. Shuster, *supra* note 23, at 193–97.

prohibit or revoke the customary roles of a chief or chieftess.<sup>59</sup> Nor can the state prevent a chief or chieftess from being recognized, honored, or given formal or functional roles at any level of the government.<sup>60</sup> Finally, the structure and organization of state governments must follow the traditions of Palau.<sup>61</sup>

The role of traditional law in modern Palauan government cannot be overstated. As the Palau Constitution requires, “the structure and organization of state governments shall follow democratic principles, traditions of Palau, and shall not be inconsistent with this Constitution.”<sup>62</sup> Known as the Guarantee Clause, this constitutional provision is the source of the problem this Comment addresses: the conflict between Palauan traditions and general democratic principles. More specifically, this Comment focuses on one example of that conflict, which occurs when a state selects members of its traditional council. For conciseness, this Comment refers to this conflict as “the original problem.” With the relevant traditional law explained, the original problem’s contours are clarified through an explanation of Palau’s democratic principles.

## 2. DEMOCRATIC PRINCIPLES

The *ourrot* selection rule is rooted in a traditional process that is not entirely democratic. Because traditional councils play a role in government, the original problem arises because the *ourrot* selection rule’s non-democratic nature comes into conflict with the implications of another constitutional guarantee—that state governments must be structured according to democratic principles. This Comment concerns one democratic principle the Palau Supreme Court has protected: the right to change one’s government.

In *Ngaimis v. Republic of Palau*,<sup>63</sup> the Palau Supreme Court held that the right to change one’s government is a democratic principle protected by the Palau Constitution.<sup>64</sup> *Ngaimis* was decided soon after *Teriong v. Government of Airai*,<sup>65</sup> a landmark case upholding another democratic principle—the right to vote.<sup>66</sup> In *Ngaimis*, the State of Ngatpang ratified its constitution, so that its legislative and executive branches would be composed entirely of the state’s traditional council members.<sup>67</sup> Unelected

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59. ROP CONST. art. V, § 1.

60. *Id.*

61. *Id.* art. XI, § 1.

62. *Id.*

63. 16 ROP 26 (App. Div. 2008).

64. *Id.* at 29–30.

65. 1 ROP Intrm. 664 (App. Div. 1989).

66. *Id.* at 675.

67. *Ngaimis*, 16 ROP at 27.

and entrenched in power, the council members thwarted state referenda on amending the state constitution to provide for democratic elections.<sup>68</sup> In response, the Palau national government filed suit against the Ngatpang state government, claiming the state's constitution violated the national constitution's Guarantee Clause under *Teriong*.<sup>69</sup> The court agreed with the national government.<sup>70</sup> Ngatpang's citizens had a right to vote, and in denying that right, the Ngatpang state government violated another democratic principle—the right to change one's government.<sup>71</sup>

The democratic principle identified in *Ngaimis* has several implications. First, if citizens have the “right to change one's government,” and “government” includes the procedures for selecting members of that government, then it follows that citizens have the right to change the mechanisms of selecting members of government. Indeed, this is precisely what Ngatpang's citizens sought to do in *Ngaimis*, and Palauan precedent supports this reasoning.<sup>72</sup> Second, it can be inferred that one reason for protecting a right to change one's government is to ensure that the citizenry can remedy government defects or do away with the existing government entirely.<sup>73</sup> Thus, in protecting that right, *Ngaimis* implicitly recognizes the citizenry's interest in remedying defects in government. This is a reasonable inference to draw. For if the legislature had no such duty, then it would not be bound to ensure the citizenry's interest in remedying the government's defects, just as Ngatpang's legislature in *Ngaimis* was unbound.<sup>74</sup>

#### *B. The Original Problem and the Palau Supreme Court's Conflicting Answers*

From *Ngaimis*, the original problem comes into full view. As previously mentioned, a traditional council is a part of government. If the traditional council's members fail to execute their constitutional duties due to vacancies on the council, then there is a defect in government. Can the citizenry remedy that defect by empowering the state to fill the vacancies? *Ngaimis* suggests that it can, but in doing so, a traditional law is violated:

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68. *Id.*

69. *Id.* at 27–29.

70. *Id.* at 28–29.

71. *Id.*

72. *See, e.g., Koror State Gov't v. Becheserrak*, 6 ROP Intrm. 74 (App. Div. 1997).

73. *See id.* at 82 (Beattie, J., concurring).

74. As further support for this inference, consider another implication of the absence of such a duty. If the legislature has no such duty, then it would be permitted to ignore entirely the citizenry's interest implicitly recognized in *Ngaimis*. This hardly seems to comport with the outcome of *Ngaimis*.

the *ourrot* selection rule.<sup>75</sup> This in turn would violate the Traditional Rights Clause of the Palau Constitution.<sup>76</sup> If the legislature identifies the defect, may it empower itself or the executive branch to remedy it? On the one hand, the implied principle from *Ngaimis*—the legislature has a duty to remedy defects in government—suggests yes.<sup>77</sup> On the other hand, in doing so, the legislature violates the *ourrot* selection rule—a tradition.<sup>78</sup> There is a conflict between tradition and democratic principle.

1. *NGARDMAU TRADITIONAL CHIEFS AND NGARA-IRRAI: THE LEGISLATIVE BRANCH MAY NOT EMPOWER ITSELF OR THE EXECUTIVE BRANCH TO CHOOSE TRADITIONAL COUNCIL MEMBERS*

In *Ngardmau Traditional Chiefs v. Ngardmau State Government*,<sup>79</sup> the Palau Supreme Court reviewed the Ngardmau state legislature’s law empowering itself to choose members of its state traditional council.<sup>80</sup> Seats within the traditional council were long vacant because of protracted title disputes, and given the council’s constitutional power to approve certain bills, the legislature enacted a law allowing itself to fill the vacant seats with members of its choosing.<sup>81</sup> The traditional council filed suit, but the trial court upheld the law.<sup>82</sup> The council appealed.<sup>83</sup>

On appeal, the Palau Supreme Court reversed.<sup>84</sup> Turning to an originalist interpretation, the court concluded that the Ngardmau state constitution’s framers intended for state traditional council members to be selected traditionally<sup>85</sup>—in other words, through the *ourrot* selection rule. Supporting its reasoning, the court found that the state’s constitution required that “[t]he powers, responsibilities and noble positions of Ngardmau chiefs” be established by the “traditional practices” of the council of chiefs.<sup>86</sup> Finding the law contrary to the Ngardmau framers’ intent, the court invalidated the law under the Ngardmau state

75. See *supra* Section I.A.1.

76. See ROP CONST. art. V, § 2 (“Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of traditional law.”).

77. See *supra* note 63 and accompanying text.

78. Recall that only the *ourrot* can select members of the traditional council. See *supra* Section I.A.1.

79. 6 ROP Intrm. 192 (App. Div. 1997).

80. *Id.* at 192.

81. *Id.* at 193–94.

82. *Id.* at 192–93.

83. *Id.* at 193.

84. *Id.*

85. *Id.* at 194–95.

86. *Id.* at 195 (quoting CONSTITUTION OF THE STATE OF NGARDMAU art. VIII, § 1).

constitution.<sup>87</sup> Thus, under *Ngardmau Traditional Chiefs*, if a state constitution's framers intended for the selection of traditional council members to comply with the *ourrot* selection rule, the legislature cannot enact laws empowering itself to select traditional council members.<sup>88</sup> But this holding was limited to one branch, the legislature.<sup>89</sup> Accordingly, a question remained: May the legislature empower the executive to select traditional council members?

Under *Ngara-Irrai Traditional Council of Chiefs v. Airai State Government*,<sup>90</sup> the answer is no.<sup>91</sup> Further evidence of how contentious clan title disputes can be, *Ngara-Irrai* arose out of a near-decade-long battle over the title of *Ngiraked*, the highest-ranked chief in the Airai state traditional council.<sup>92</sup> The Airai state legislature (perhaps learning from the *Ngardmau* state legislature) dealt with the dispute by passing a state law authorizing the governor to certify the proper title bearer.<sup>93</sup> Was this permissible? The Palau Supreme Court answered clearly, “[t]here is . . . no question that the governor of a state has no role . . . in choosing [a] chief pursuant to Palauan custom.”<sup>94</sup> Thus, under *Ngara-Irrai*, the legislature may not empower the executive branch to select members of the traditional council.<sup>95</sup>

Given that Palau's state governments are comprised only of an executive and legislative branch, reading *Ngara-Irrai* and *Ngardmau Traditional Chiefs* together, the court presents one answer to the original problem: legislatures may not empower the state to select members of the traditional council. For the remainder of this Comment, the court's holding will be referred to as “*Ngardmau Traditional Chiefs-Ngara-Irrai*.”

The Palau Constitution supports *Ngardmau Traditional Chiefs-Ngara-Irrai*. Under the Palau Constitution, traditional law and statutes are equally authoritative.<sup>96</sup> It is well-settled traditional law that a clan's *ourrot* have the exclusive authority to choose their title holders (the *ourrot* selection rule).<sup>97</sup> While neither *Ngardmau Traditional Chiefs* nor *Ngara-Irrai* explicitly stated that the *ourrot* selection rule was the traditional rule that was violated,<sup>98</sup> it can be inferred that when a state chooses a council

87. *Id.* at 195–96.

88. *Id.*

89. *Id.* at 194–95.

90. 6 ROP Intrm. 198 (App. Div. 1997).

91. *Id.* at 201.

92. *Id.* at 199–200, 205.

93. *Id.* at 199–200.

94. *Id.* at 201.

95. *Id.* at 201–02.

96. ROP CONST. art. V, § 2.

97. *Uehara v. Obeketang*, 1 ROP Intrm. 267, 269 (Trial Div. 1985); *Espangel v. Diaz*, 3 ROP Intrm. 240, 243 (App. Div. 1992).

98. *See supra* Section I.A.1.

member, two adverse outcomes likely occur. First, if the *ourrot* have not selected the title bearer, there is a deprivation of the *ourrot*'s authority or, at the very least, an infringement of that authority.<sup>99</sup> Second, if the *ourrot* have selected a title bearer other than the state's choice, the state has prevented a traditional leader from being recognized. In the first instance, the legislature violates the Guarantee Clause, a traditional law, by creating a government contrary to Palauan tradition.<sup>100</sup> In the second instance, the legislature directly violates the Traditional Rights Clause, which prohibits "prevent[ing] a traditional leader from being recognized."<sup>101</sup> This analysis was not considered in *Obeketang v. Sato*, the Palau Supreme Court's second answer to the problem.<sup>102</sup>

## 2. *OBEKETANG*: THE LEGISLATURE MAY INDIRECTLY CHOOSE MEMBERS OF THE TRADITIONAL COUNCIL

The court's decision in *Obeketang* presents an entirely different answer to the original problem. This answer provides a way for legislatures to empower the state to choose members of its traditional council.

In *Obeketang*, the Ngerchelongs state legislature passed a resolution granting Singichi Sato a seat in the legislature as *Tet*.<sup>103</sup> The title of *Tet* was in dispute, and its council seat had been vacant for over twenty-seven years.<sup>104</sup> Although Sato had not been approved by the clan's *ourrot* and the state constitution required that vacant council seats be filled by chiefs chosen according to tradition, the legislature awarded Sato the *Tet*'s seat.<sup>105</sup> The legislature argued it was permitted to do so under its Sole Judge Clause power, which empowered the legislature to determine the qualifications of its members.<sup>106</sup>

One might assume that *Ngardmau Traditional Chiefs* applies. While not directly choosing a member of the traditional council, the legislature indirectly did so by awarding a council seat to a candidate unapproved by the clan's *ourrot*. The court, however, saw matters differently. In its view, whether the legislature could seat Sato within its chambers as *Tet* was a non-justiciable political question.<sup>107</sup> The Ngerchelongs state constitution

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99. The *ourrot* selection rule, by definition, vests the authority to select a candidate exclusively in the *ourrot*. See *supra* Section I.A.1.

100. 1 PALAU NAT'L CODE ANN. § 303; ROP CONST. art. XI, § 1.

101. *Id.* art. V, § 1.

102. *Obeketang v. Sato*, 13 ROP 192 (App. Div. 2006).

103. *Id.* at 193.

104. *Id.*

105. *Id.* at 194–99.

106. *Id.* at 195–98.

107. *Id.* at 199 (“[T]he political question doctrine precludes our review of the Assembly's action.”).

did not contain express qualifications, nor did it provide a process for choosing the rightful title holder of *Tet*.<sup>108</sup> Thus, the court reasoned, the state constitution's Sole Judge Clause represented a "textually demonstrable constitutional commitment" to the Ngerchelong state legislature to decide the question of seating a traditional chief within its chambers.<sup>109</sup>

Thus, under *Obeketang*, a state legislature may pass resolutions deciding a proper title bearer. If the state's constitution textually commits the question of seating a traditional chief within the legislature to a branch other than the judiciary, the political question doctrine applies. And because the political question doctrine applies, the question is non-justiciable, even if there are state constitutional provisions requiring that traditional leaders be appointed through custom.<sup>110</sup> Under *Obeketang*, a state legislature may indirectly empower itself to choose its traditional council members.<sup>111</sup>

## II. THE PROBLEM WITH A FRAMEWORK OF TWO CONFLICTING DECISIONS

The conflict between *Ngardmau Traditional Chiefs-Ngara-Irrai* and *Obeketang* is problematic and necessitates an alternative framework. First, this Part will analyze the problems unique to each rule, as well as the overarching problem of having two separate rules. Second, a solution is proposed: a framework analogous to the *Anderson-Burdick* doctrine that weighs the *ourrot*'s interest in selecting its title bearers against the government's interest in filling vacant council seats.

### A. The Problems with Each Holding

*Ngardmau Traditional Chiefs-Ngara-Irrai* and *Obeketang* pose significant problems. First, *Ngardmau Traditional Chiefs-Ngara-Irrai* is inadequate, and in certain situations inapplicable, to determining whether elected officials may fill traditional council vacancies. Second, *Obeketang*, by declining to answer the problem clearly, causes confusion and considerable costs. This Section first examines the problems of *Ngardmau Traditional Chiefs-Ngara-Irrai*, then turns its attention to *Obeketang*.

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108. *Id.* at 197.

109. *Id.* at 198.

110. *Id.* at 199.

111. *Id.*

1. PROBLEMS WITH *NGARDMAU TRADITIONAL CHIEFS-NGARA-IRRAI*

*Ngardmau Traditional Chiefs-Ngara-Irrai* leaves legislatures to employ a trial-and-error approach in resolving government defects. *Ngardmau Traditional Chiefs, Ngara-Irrai, and Obeketang* shared the same underlying defect: traditional councils with vacant seats.<sup>112</sup> These vacancies are problematic when a council plays a significant role in government. In Ngardmau state, the traditional council must, as need, guide legislation involving tradition, veto bills, arbitrate disputes between branches, and override the governor's veto power.<sup>113</sup> In Airai, the traditional council must advise the governor over matters of tradition.<sup>114</sup> In Ngerchelong, half the legislature consists of traditional council members.<sup>115</sup> Considering these roles, it is unsurprising that the state legislatures attempted to fill the vacancies. Onlookers might even sympathize when they realize that, in all three cases, the inability to fill vacancies resulted from a blatantly obvious problem—embroilment in title disputes.<sup>116</sup>

The effects of title disputes on a traditional council cannot be overstated. A title award determines a council's composition, and council members have an interest in selecting their future colleagues.<sup>117</sup> These interests are pronounced when the council wields significant political power, since the council can wield such power more effectively when members are united. Because of competing interests—the candidate's interest in obtaining title, the *ourrot's* interest in selecting a candidate, and the council member's interest in working with allies—title disputes are messy and sordid affairs. These disputes can easily distract councils from their constitutional duties, and as history and contemporary times indicate, the distractions can last for years.<sup>118</sup>

Under *Ngardmau Traditional Chiefs-Ngara-Irrai*, the state legislatures cannot resolve the embroilment by deciding to whom title belongs.<sup>119</sup> Doing so, according to *Ngardmau Traditional Chiefs-Ngara-*

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112. *Id.* at 193; *Ngara-Irrai Traditional Council of Chiefs v. Airai State Gov't*, 6 ROP Intrm. 198, 200–01 (App. Div. 1997); *Ngardmau Traditional Chiefs v. Ngardmau State Gov't*, 6 ROP Intrm. 192, 193–94 (App. Div. 1997).

113. Shuster, *supra* note 23, at 190, 193.

114. *Id.*

115. *Id.*

116. *See supra* notes 81, 92–93, 103–06 and accompanying text.

117. Force, *supra* note 32, at 36–40.

118. *See, e.g., Obeketang v. Sato*, 13 ROP 192 (App. Div. 2006).

119. *Ngara-Irrai Traditional Council of Chiefs v. Airai State Gov't*, 6 ROP Intrm. 198, 201–02 (App. Div. 1997); *Ngardmau Traditional Chiefs v. Ngardmau State Gov't*, 6 ROP Intrm. 192, 195 (App. Div. 1997).

*Irrai*, violates tradition.<sup>120</sup> This reasoning reveals the inadequacy of *Ngardmau Traditional Chiefs-Ngara-Irrai* as a rule. In *Ngardmau Traditional Chiefs* and *Ngara-Irrai*, the court did not explicitly explain which or how tradition is violated.<sup>121</sup> In failing to do so, *Ngardmau Traditional Chiefs-Ngara-Irrai* forces state legislatures to employ a trial-and-error approach in resolving the gridlock caused by title disputes. In turn, this obstructs the state from meeting its duty to fulfill, or at the very least ensure, the citizenry's interest in remedying a defect in government.

To add salt to the wound, failing to explicitly state which traditional law is violated leads to another problem: the rule's inability to remedy other violations of the *ourrot* selection rule. In both *Ngardmau Traditional Chiefs* and *Ngara-Irrai*, the legislature's selection was direct.<sup>122</sup> But, as *Obeketang* shows, a legislature may indirectly select a council member with its Sole Judge Clause power.<sup>123</sup> If a legislature reserves seats within its chambers for each traditional council member's title, the legislature may indirectly select a council member by awarding the reserved seat.<sup>124</sup> By awarding that seat, the legislature announces to the public that its selected candidate is the proper title bearer. Once that announcement is made, the *ourrot selection rule* is violated. The power to make that announcement properly belongs to the candidate's respective *ourrot*, not the legislature. Why? Because a decision, whether the legislature's or the *ourrot*'s, carries weight only if the public respects the decision-making body's institutional authority.<sup>125</sup> By announcing that a candidate other than the *ourrot*'s choice is the proper title bearer, the legislature calls into question—and usurps—the *ourrot*'s traditional authority to select its preferred candidate. Undermining the *ourrot*'s authority hardly seems consistent with *Ngardmau Traditional Chiefs* and *Ngara-Irrai*, both of which aimed to protect tradition.<sup>126</sup> Even more concerning, if the *ourrot* have selected an individual, the legislature's decision to seat a different individual risks the constitutional violation of preventing a traditional leader from being recognized.<sup>127</sup>

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120. *Ngara-Irrai Traditional Council of Chiefs*, 6 ROP Intrm. at 201; *Ngardmau Traditional Chiefs*, 6 ROP Intrm. 194–95.

121. *Ngara-Irrai Traditional Council of Chiefs*, 6 ROP Intrm. at 201; *Ngardmau Traditional Chiefs*, 6 ROP Intrm. at 195.

122. *Ngara-Irrai Traditional Council of Chiefs*, 6 ROP Intrm. at 200–01; *Ngardmau Traditional Chiefs*, 6 ROP Intrm. at 194.

123. *Obeketang*, 13 ROP at 197–99.

124. *See id.* at 194, 199.

125. *See, e.g.,* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 275 (2002).

126. *Ngara-Irrai Traditional Council of Chiefs*, 6 ROP Intrm. at 201; *Ngardmau Traditional Chiefs*, 6 ROP Intrm. at 194–95.

127. ROP CONST. art. V, § 1.

Taking these two problems together, *Ngardmau Traditional Chiefs-Ngara-Irrai* is at best inadequate and at worst inapplicable to resolving the original problem. Recall that the original problem asks whether the legislature may empower the state to select a member of its traditional council.<sup>128</sup> *Ngardmau Traditional Chiefs-Ngara-Irrai*'s answer is a strict rule without consideration of the circumstances: no, the legislature may not empower the state to select a member of its traditional council, even if it is to remedy a defect in government.

## 2. PROBLEMS WITH *OBEKETANG*

*Obeketang* fails to directly determine whether elected officials may fill traditional council seats, potentially complicating further the original problem's effects. Under *Obeketang*, whether the legislature may do so depends on how the legislature selects its preferred candidate.<sup>129</sup> If the legislature, through its Sole Judge Clause power, selects the candidate by awarding a seat within its chambers, the judiciary is precluded from review.<sup>130</sup> By allowing courts to avoid addressing the issue, *Obeketang* effectively provides legislatures a way to select traditional council members. By implication, *Obeketang*'s answer to the original problem is that a legislature can empower either itself or the executive branch to select traditional council members.

Adding to this confusion, *Obeketang*'s holding does not prevent a court from determining whether a Sole Judge Clause is used unconstitutionally, but the court did not address under what circumstances this situation would arise.<sup>131</sup> The court did not elaborate further on this statement, so it is unclear when and how the caveat applies.

One possible situation in which a court may determine whether the Sole Judge Clause is used unconstitutionally is found in *Rengiil v. Ongos*.<sup>132</sup> There, the court held that "the nuances of traditional title disputes include exactly the type of precise issues that preclude categorical resolution of [a] case as nonjusticiable."<sup>133</sup> In *Rengiil*, a candidate approved by his respective clan's *ourrot* sued his state legislature for denying his title's seat within the legislature's chambers.<sup>134</sup> Relying on its Sole Judge Clause power, the legislature refused to determine the candidate's qualifications until all disputes related to the title were

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128. See *supra* Introduction.

129. *Obeketang v. Sato*, 13 ROP 192, 198–99 (App. Div. 2006).

130. *Id.*

131. *Id.*

132. 22 ROP 48 (App. Div. 2015).

133. *Id.* at 53.

134. *Id.* at 49.

resolved.<sup>135</sup> In summary, the legislature did not immediately grant the candidate his seat despite the *ourrot*'s approval.<sup>136</sup> The court held that by failing to determine the candidate's qualifications, the legislature "prevent[ed] a traditional leader from being recognized."<sup>137</sup> The legislature's inaction was an unconstitutional exercise of the legislature's Sole Judge Clause power.<sup>138</sup> Notably, *Rengiil* does not overrule *Obeketang*; the plaintiff in *Rengiil* had already been approved by his clan's *ourrot*, while the plaintiff in *Obeketang* had not.<sup>139</sup> Interestingly, the *Rengiil* Court stumbled upon the problem of elected officials filling traditional council seats and provided its take in a footnote: "The Court is unaware of . . . any statutory law outlining how a traditional chief title dispute shall be resolved."<sup>140</sup> The *Rengiil* Court itself, despite citing *Obeketang*, *Ngardmau Traditional Chiefs*, and *Ngara-Irrai*, did not know how to resolve the problem.

In light of *Rengiil*, it is unclear when *Obeketang* applies. This leaves litigants uncertain of legal outcomes and potentiates further disputes. Examining these problems, *Obeketang* proves costly to a state and its citizens, involving the costs of attempting to comply with an unclear rule; the costs of negotiations without clear legal boundaries; the costs of trials; the costs of appeals; the costs of revisiting the rule; the costs of dissatisfied parties; and perhaps worst of all, the costs of time elapsed while a governmental defect remains.<sup>141</sup> The legislatures may have won in *Obeketang*, but the prize was an apple of discord.

#### B. The Overarching Problem of Ngardmau Traditional Chiefs-Ngara-Irrai and Obeketang

*Ngardmau Traditional Chiefs-Ngara-Irrai* and *Obeketang* present two competing rules in answering the same question. This could create confusion among litigants.<sup>142</sup> Because that question is necessary to

135. *Id.* at 49–50.

136. *Id.* at 49.

137. *Id.* at 53–54 (quoting ROP CONST. art. V, § 1).

138. *Id.* at 54.

139. Compare *id.* at 49, with *Obeketang v. Sato*, 13 ROP 192, 193–94 (App. Div. 2006).

140. *Rengiil*, 22 ROP at 51 n.4.

141. See generally Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-percolation After Rapanos*, 15 VA. J. SOC. POL'Y & L. 299, 300–14 (2008).

142. To emphasize the gravity of the costs associated with this confusion, consider who might be involved in such litigation: the parties with the competing title claims (which can consist of a multitude of individuals), the clan's *ourrot* (which usually consist of multiple individuals), the already-seated members of the traditional council, the traditional council itself as an institution, the state government, the national government, and, if land rights are attached to that title, parties with claims to such land.

determine whether elected officials may fill traditional council vacancies, the lack of a clear answer means the problem remains unresolved.

The incongruity of the two rules is apparent given *Rengiil*'s implicit question: Who holds the authority to resolve title disputes?<sup>143</sup> *Ngardmau Traditional Chiefs-Ngara-Irrai* and *Rengiil* suggest a court should turn to traditional law for a resolution.<sup>144</sup> If traditional law controls, then it is the *ourrot*, or possibly the traditional council, that holds the authority to resolve title disputes. However, under *Obeketang*, title disputes may be resolved indirectly by a legislature through its Sole Judge Clause power by awarding a legislative seat to its selected candidate.<sup>145</sup> These are two different answers to the same question, and as *Rengiil* acknowledges, analyzing the issue is unclear.<sup>146</sup> Consequently, both *Ngardmau Traditional Chiefs-Ngara-Irrai* and *Obeketang* can create confusion among litigants. When would a claimant file a complaint? Under *Ngardmau Traditional Chiefs-Ngara-Irrai* and *Obeketang*, the answer is when the legislature empowers either itself or the executive to select a council member, but only if (a) the legislature does so without its Sole Judge Clause power and (b) if it does so with its Sole Judge Clause power, the legislature exercises that power constitutionally. What is a constitutional exercise of the Sole Judge Clause power? No one knows.

The answer to the original problem requires answering *Rengiil*'s question: Who or what has the authority to resolve title disputes?<sup>147</sup> If the legislature holds that authority, it may empower itself or the executive to select council members in the event of a title dispute.<sup>148</sup> However, if the *ourrot* or the traditional council holds that authority, the legislature cannot—directly or indirectly—select a member of its traditional council, even if a title dispute exists.<sup>149</sup> Doing so would undermine the *ourrot* or the traditional council's authority.<sup>150</sup> Because the Palau Supreme Court has accepted neither proposition, the question of whether elected officials may fill traditional council vacancies remains unanswered.

This Comment argues that the question's answer is not a bright line rule but a framework that weighs the *ourrot*'s and the state government's interests. While an interest-weighting framework is susceptible to subjectivity, objections on this ground do not negate the fact that the framework provides a consistent procedure.

143. *Rengiil*, 22 ROP at 51 n.4.

144. *Ngara-Irrai Traditional Council of Chiefs v. Airai State Gov't*, 6 ROP Intrm. 198, 201–02 (App. Div. 1997); *Ngardmau Traditional Chiefs v. Ngardmau State Gov't*, 6 ROP Intrm. 192, 194–95 (App. Div. 1997); *Rengiil*, 22 ROP at 51 n.4.

145. *Obeketang v. Sato*, 13 ROP 192, 198–99 (App. Div. 2006).

146. *Rengiil*, 22 ROP at 51, 51 n.4.

147. *Compare id.*, with *supra* Section I.B.

148. *See supra* Section I.B.2.

149. *See supra* Section I.B.1.

150. *Id.*

### III. THE ALTERNATIVE FRAMEWORK: ANALOGIZING TO *ANDERSON-BURDICK*

Resolving the incongruency while considering the interests at stake, this Comment proposes a balancing test framework analogous to the *Anderson-Burdick* doctrine. First, this Part provides a brief background of the test with an explanation of the test's mechanisms. Next, this Part presents the analogous framework. Finally, this Part applies the analogous framework to the facts of *Ngardmau Traditional Chiefs*, *Ngara-Irrai*, and *Obeketang*.

#### A. *The Anderson-Burdick Doctrine's Origins*

The *Anderson-Burdick* doctrine originates in American election law and is composed of two separate holdings, *Anderson v. Celebrezze*<sup>151</sup> and *Burdick v. Takushi*.<sup>152</sup> The doctrine provides a method for determining the constitutionality of a state restriction on the right to vote.<sup>153</sup> Examples of such restrictions include a state law requiring mail-in ballots to be received by a particular day or a regulation limiting the number of polling places.<sup>154</sup> These restrictions implicate voters' interests in freely exercising their right to political expression and their right to vote.<sup>155</sup> For example, if a voter's mail-in ballot is received past the statutory deadline, the voter's vote might not be counted, or if the nearest poll is too far from a voter, the voter's right to vote might be burdened by the cost of travel. The *Anderson-Burdick* doctrine attempts to balance a state's interest in facilitating its election procedures and a voter's interest in freely exercising the rights to vote and to political expression.<sup>156</sup>

The doctrine operates by applying strict scrutiny if the state's restrictions significantly burden the voter's interest in freely exercising the rights to vote and to political expression.<sup>157</sup> Under strict scrutiny, the restrictions must be narrowly tailored to meet a compelling government

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151. 460 U.S. 780 (1983).

152. 504 U.S. 428 (1992).

153. Heather S. Heidelbaugh, Logan S. Fisher & James D. Miller, *Protecting the Integrity of the Polling Place: A Constitutional Defense of Poll Watcher Statutes*, 46 HARV. J. ON LEGIS. 217, 221–22 (2009); *The Anderson-Burdick Doctrine: Balancing the Benefits and Burdens of Voting Restrictions*, SCOTUSBLOG [hereinafter *Anderson-Burdick Doctrine*], <https://www.scotusblog.com/election-law-explainers/the-anderson-burdick-doctrine-balancing-the-benefits-and-burdens-of-voting-restrictions/> [<https://perma.cc/4YGK-BZ5P>] (last visited Oct. 12, 2021).

154. *Anderson-Burdick Doctrine*, *supra* note 153.

155. *Anderson*, 460 U.S. at 788.

156. *See Anderson-Burdick Doctrine*, *supra* note 153.

157. *See Burdick*, 504 U.S. at 434.

interest.<sup>158</sup> If the state's restrictions impose only a minimal burden, the court weighs the character and magnitude of the impairments to the voter's rights against the state's interests.<sup>159</sup> When weighing these factors, courts must consider which of the imposed burdens are necessary to achieve the state's interests.<sup>160</sup>

### *B. The Analogous Framework*

The *Anderson-Burdick* doctrine informs the original problem. Instead of applying the *Anderson-Burdick* doctrine to the state and a voter, the test is applied to the legislature and the *ourrot* while retaining the doctrine's original procedures. First, the court must determine whether the legislature's means of empowering either itself or the executive to select a council member severely burdens the *ourrot*'s right to select a candidate of its choice.<sup>161</sup> If the burdens are severe, then the court applies strict scrutiny.<sup>162</sup> Thus, under strict scrutiny, the legislature's means must be narrowly tailored to meet the legislature's interest—remediating the council's embroilment in title disputes.<sup>163</sup> However, if the burdens are minimal, the court must weigh the character and magnitude of the impairment to the *ourrot*'s right to select the candidates of its choice against the legislature's interest in remediating the council's embroilment in title disputes.<sup>164</sup> When weighing these factors, the court must consider which of the burdens imposed on the *ourrot* are necessary to achieve the legislature's interest.<sup>165</sup>

Applying this framework to Palauan jurisprudence requires modification. First, the state's interest in resolving embroilment is strongest when its traditional council plays a significant role in government. This is because the state has an interest in effective governance, and a traditional council so embroiled in title disputes would prevent such effectiveness.<sup>166</sup> Because traditional councils are afforded different constitutional powers, the distinction between "significant" and "insignificant" is a matter of degree rather than of kind.<sup>167</sup> Thus, a traditional council with the powers to veto, execute laws, and approve bills plays a far more significant role in government than a traditional council

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158. *Id.*

159. *Anderson*, 460 U.S. at 788–89.

160. *Id.* at 789.

161. *See Burdick*, 504 U.S. at 434.

162. *See id.*

163. *See id.*

164. *See Anderson*, 460 U.S. at 788–89.

165. *See id.* at 789.

166. *See supra* Section II.A.1.

167. *See Shuster, supra* note 23, at 193–97.

empowered with a purely advisory role, devoid of any considerable legislative or executive powers. When a traditional council holds weak or few powers, it plays a less significant role, and the state's interest in a complete traditional council is at its weakest. Of course, like the *Anderson-Burdick* doctrine, the distinction is dependent on each case's facts. A traditional council with a purely advisory role on matters of tradition does not imply an insignificant or less than significant role in government. If the state is engaged in extensive legislation concerning tradition, the traditional council can hardly be characterized as playing a role that is anything less than significant.

Second, the *ourrot's* interest is heightened when the title in dispute is a high-ranking title, particularly if it is the highest-ranked title.<sup>168</sup> This is because a high-ranking title holder plays not only a significant role in the state's traditional council, but also in the state's society as a whole.<sup>169</sup> As a result of their rank, the title holder is afforded significant respect and deference by the state's citizenry in matters of tradition.<sup>170</sup> Because of this respect and deference, it follows that the *ourrot* have a heightened interest in ensuring it selects a candidate capable of executing the duties attached to high title. The *ourrot*, by virtue of managing the clan's affairs, have more interaction with, and more information about, any given candidate. Therefore, they are in the best position to assess a candidate's capabilities. These factors are especially relevant when the disputed title is the state's highest-ranked title, as the prospective title holder would serve on both the state's traditional council and the president's advisory council.

Third, strict scrutiny is arguably heightened when the *ourrot* have selected a candidate and the state intends to select another than when the *ourrot* have not selected a candidate and the state intends to select one. Two premises support this inference. First, assuming the *ourrot* have made a selection, if the state selects a different candidate, such state action directly undermines the *ourrot's* right to select its preferred candidate.<sup>171</sup> Second, any justification for why the legislature is empowering itself or the executive to select a different candidate would have to address the consequent constitutional violation of preventing a traditional leader from being recognized. Given these two premises, and the fact that most embroilments result from the *ourrot* failing to select, it is likely that most cases requiring application of the analogous framework will involve situations where the *ourrot* have not made a selection and the legislature intends to make a selection. Bearing these inferences in mind, this Comment now turns to a few applications.

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168. See *supra* Section I.B.1.

169. Shuster, *supra* note 23, at 193–97.

170. *Id.*

171. See *supra* Section II.B.

Applying the analogous framework, the same conclusions would have been reached in *Ngardmau Traditional Chiefs* and *Ngara-Irrai*, but an open question would remain for *Obeketang*. If the *Ngardmau Traditional Chiefs* Court applied the framework, it would have invalidated the Ngardmau legislature's statute authorizing certification. There, the Ngardmau state legislature attempted to appoint its chosen candidate as the proper title bearer.<sup>172</sup> First, the court examines the burden imposed on the *ourrot*. That examination would reveal that the burden was severe. Because the *ourrot* had made a selection,<sup>173</sup> the legislature's certification undermined the *ourrot*'s authority to select the candidate of its choice.<sup>174</sup> Thus, strict scrutiny would apply.<sup>175</sup> Applying strict scrutiny, the court would have found that the legislature's means were not narrowly tailored to satisfy a compelling state interest—resolving the council's embroilment in title disputes.<sup>176</sup> The means were not narrowly tailored because the legislature's law allowed the legislature simply to appoint council members in the event of a dispute.<sup>177</sup> Cast in those terms, the certification meant that the legislature was authorized to select a candidate in any dispute, no matter how minor or brief. Simply put, the law is overinclusive. Because the law fails under strict scrutiny, under the analogous framework, the Ngardmau legislature's certification is invalid.

Similarly triggering strict scrutiny, the Airai governor's declaration would be invalidated following the analogous framework under *Ngara-Irrai*. Like the Ngardmau legislature, the Airai legislature's law enabled the governor to directly undermine the *ourrot*'s authority by declaring the governor's preferred candidate.<sup>178</sup> If one were to apply strict scrutiny, the law is not narrowly tailored because it does not specify when the governor may declare a candidate other than in the case of a title dispute.<sup>179</sup> However, even if the law managed to survive strict scrutiny, in weighing the legislature's and the *ourrot*'s interests, the *ourrot*'s interests likely outweigh those of the legislature—the disputed title was *Ngiraked*, the highest-ranked title for the state of Airai.<sup>180</sup>

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172. *Ngardmau Traditional Chiefs v. Ngardmau State Gov't*, 6 ROP Intrm. 192, 194 (App. Div. 1997).

173. *See id.* at 194, 195 n.8.

174. *Compare id.*, with *Anderson v. Celebrezze*, 460 US. 780, 788 (1983); *accord supra* notes 87–88 and accompanying text.

175. *See Burdick v. Takushi*, 504 US. 428, 434 (1992).

176. *See Ngardmau Traditional Chiefs*, 6 ROP Intrm. at 194; *see Burdick*, 460 U.S. at 434.

177. *Ngardmau Traditional Chiefs*, 6 ROP Intrm. at 194–95.

178. *Ngara-Irrai Traditional Council of Chiefs v. Airai State Gov't*, 6 ROP Intrm. 198, 199 (App. Div. 1997).

179. *See id.* at 200–02.

180. *Council of Chiefs*, <https://www.palau.gov/pw/executive-branch/council-of-chiefs> [<https://perma.cc/5PD7-F82L>] (last visited Oct. 9, 2021).

Finally, under *Obeketang*, the validity of the Ngerchelong legislature's awarding of a legislative seat requires further facts and could go either way. First, the burden imposed on the *ourrot* was not nearly as severe as the preceding two cases. In *Obeketang*, the *ourrot* itself was in dispute over several candidates.<sup>181</sup> By being in dispute, the *ourrot*'s authority in selecting a candidate diminished because the *ourrot* itself could not select a candidate. Thus, the analysis forgoes strict scrutiny and goes immediately to interest weighing. While the *ourrot* have an interest in selecting its preferred candidate, the state also has an interest in deciding the members of its legislature. Given that the title in dispute, *Tet*, is not the highest-ranking title,<sup>182</sup> the *ourrot*'s interest was not at its zenith. In comparison, because the *Tet* sits in the state legislature,<sup>183</sup> years of vacancy indicate a compelling state interest to fill the seat. If there are other vacancies in the legislature, or if further facts indicate that the *ourrot* cannot be expected to select a candidate, the legislature's awarding of a seat likely would be valid.

The above analyses demonstrate the value of applying the *Anderson-Burdick* doctrine to Palauan constitutional law. Their outcomes are in line with the Palau Constitution's requirement that state governments comply with both democratic principles and tradition. The outcomes are also in line with *Rengil*'s affirmation that traditional institutions, such as the *ourrot*, resolve title disputes. The framework's most valuable benefit, however, is that it does not categorically preclude a legislature from attempting to remedy a governmental defect. In light of the framework's procedural mechanisms, the analogous framework, while not a bright line rule, provides some form of consistency to future litigants.

### C. The Analogous Framework's Potential Problems

Because the analogous framework potentially pulls the judiciary into legislative or executive functions, two problems arise. First, judicial involvement might raise concerns about courts wading into the political thicket. Second, adjudication of these issues raises separation of powers concerns. These problems are addressed in turn.

#### 1. THE POLITICAL THICKET

The "political thicket" is a term coined by Justice Frankfurter to describe the entanglement of courts with political issues.<sup>184</sup> According to Justice Frankfurter, when a court decides competing political theories, it

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181. *Obeketang v. Sato*, 13 ROP 192, 193 (App. Div. 2006).

182. See *Council of Chiefs*, *supra* note 180.

183. *Obeketang*, 13 ROP at 194.

184. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

has stepped into the thicket.<sup>185</sup> The court, however, has no legal authority to make such decisions.<sup>186</sup> The argument is reasonable. A political theory, with all its nuances, may not be supported by most of the community, let alone all of the community. It follows that when a court decides to adopt one political theory—absent any legal authority—it no longer remains an objective arbiter because its decision is based on personal value judgments.<sup>187</sup> The question for the analogous framework, then, is whether its application requires a court to decide between competing political theories.

A legislature's enactment of a law to select a member of its traditional council raises questions that require courts to decide between competing theories. This is because determining the legitimacy of that law hinges on two factors: (1) whether the law prohibits or revokes the role or function of a traditional leader<sup>188</sup> and (2) whether the law complies with the underlying principles of traditional law.<sup>189</sup> Because the law involves resolving the tension between the state and its traditional council's powers, boundaries between those powers must be established. And some political theory must justify those boundaries. For example, when a legislature enacts such a law, the relevant political theory question might be, How should powers be divided between traditional councils and legislatures? One theory might state that, in a modern society, democracy is paramount, and accordingly, the legislature should be able to select traditional council members as needed.<sup>190</sup> Another theory might state that, because cultural preservation is paramount, customary law should prevail, and so the legislature cannot select council members.<sup>191</sup> The act of choosing one or the other of these two theories is what Justices Frankfurter and Harlan argued courts could not and should not do.<sup>192</sup> The political thicket problem, then, is premised on whether a court must answer questions that require deciding between competing political theories.

The fact that a law raises these questions does not imply that a court must answer them. The political thicket problem can be reduced to the following: if a challenge to a law raises political theory questions, a court must answer such questions to resolve the challenge. The contrapositive of this is that if a court does not answer political theory questions in resolving a challenge to a law, the challenge does not raise political theory

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185. See *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

186. See *id.* at 333 (Frankfurter, J., dissenting).

187. See *id.* at 300 (Frankfurter, J., dissenting).

188. ROP CONST. art. V, § 1.

189. ROP CONST. art. V, § 2.

190. See, e.g., Kerry E. James, *Tonga's Pro-Democracy Movement*, 67 PAC. AFFS. 242, 245 (1994).

191. See, e.g., RON CROCOMBE, *THE PACIFIC WAY: AN EMERGING IDENTITY* 1–3, 13 (1976); LAWSON, *supra* note 1, at 171.

192. See *Baker*, 369 U.S. at 332–34 (Harlan, J., dissenting).

questions. But the contrapositive is not universally true, for a challenge to a law can raise political theory questions without a court answering those questions. A court may do so by applying a rationale composed of the decisions of another governmental institution (e.g., the legislature). If a court relies exclusively on those decisions in its rationale, it does not formally select its theory of choice. Instead, it follows and applies the theory selected by another institution properly designated to make that selection. In other words, another governmental institution has decided which theory prevails, and the court is merely adhering to that decision. Thus, with respect to laws empowering a state to select its council members, for courts to answer political theory questions and therefore decide between competing political theories is unnecessary. For example, a court might reason that Congress concluded that state governments must have traditional and democratic governments. The facts demonstrate that by allowing the legislature to decide its council members, the traditional government would be so greatly reduced that there would no longer be a traditional government. Therefore, in such a case, the legislature may not enact a law selecting its council members.

The buzzword in the preceding argument, of course, is “greatly.” “Greatly” is a qualitative term, requiring some form of subjectivity for assessment. At what point is a reduction so “great” that a traditional government no longer exists? This is a subjective inquiry the answer to which depends on how a court interprets “great.” But the fact that this question exists does not imply that there are no points at which reductions are at their maxima or minima—that is that there are shades of gray does not imply that the colors black and white do not exist. To assume that implication would be false equivocation or worse, a direct path to *reductio ad absurdum*: if a traditional council consisted of only one member, would it still exist if the legislature were allowed to select that member? Surely not, for that would reduce the traditional government into a subordinate of the legislature. Justice Kagan summarizes this analysis succinctly: when a court must ask, “How much is too much?” the answer can simply be that “[t]his much is too much.”<sup>193</sup> Again, questions involving the original problem are questions of degree rather than of kind.

The pertinent question, then, is How does a court deal with situations that require greater subjectivity? The answer is through the analogous framework’s component of strict scrutiny. Under strict scrutiny, the court must determine (a) whether a burden imposed is severe, (b) whether the state’s interests are sufficiently compelling, and (c) whether the state’s means of accomplishing those interests are narrowly tailored. Each of these components—severity, sufficiency, and narrow tailoring—can be assessed by looking to the facts of previous cases, making determinations

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193. See *Rucho v. Common Cause*, 588 U.S. 1, 25–26 (2019) (Kagan, J., dissenting).

of those components based on those facts, and comparing those facts and determinations to the present case. If the facts are similar, the court follows those determinations. But if the facts are novel, the court may have to engage in more creative reasoning. In some instances, that may require the court's ex ante predictions. So long as those predictions are grounded in objective reasoning and reliant on empirical observation, the court, at the very least, has lessened the subjectivity component. To cast these abstractions in practice, consider an example.

Recall that in *Ngara-Irrai*, the court found that the governor could not select the *Ngiraked*, the traditional council's highest-ranking chief, even if the chief's seat remained vacant.<sup>194</sup> Putting this in terms of the analogous framework, the burden imposed on the *Ngiraked*'s *ourrot* was severe, as it had made a decision.<sup>195</sup> On the other hand, the state had a sufficiently compelling interest in selecting a candidate to perform the *Ngiraked*'s constitutional duties.<sup>196</sup> Nevertheless, the state's means were not narrowly tailored: there were other ways to accomplish its interest—a filled seat—such as offering to mediate.<sup>197</sup>

Now, consider a hypothetical. Suppose that the *ourrot* fail to select a candidate. In response, the legislature passes a bill empowering the governor to select a leader only if, after a designated time, the dispute has not been resolved. Now suppose that the designated time elapses and the *ourrot* still have not selected a candidate. Would the law survive strict scrutiny? First, this is a novel fact pattern; there are no decisions on point. Thus, the court must engage in creative reasoning. One way to do so is by looking to a decision whose fact pattern shares similarities—in this case, *Ngara-Irrai*. The fit is imperfect, as here, the court is dealing with a delay in exercising executive power, whereas in *Ngara-Irrai*, the governor was enabled to exercise his power at a moment's notice. Hence, the court may need to make ex ante predictions. One such prediction can be made by recognizing that the burden's severity is an increasing function of time; assuming the *ourrot* do not decide, the burden's severity increases as the deadline draws nearer.

Recognizing the time-dependency variable, the court might first determine a reasonable amount of time allotted for the *ourrot*'s decision. To do so, it might turn to data representing how much time *ourrot* take to select a candidate. Depending on the data's skew, the court may consider using the arithmetic mean or the median. Suppose the court employs the

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194. *Ngara-Irrai Traditional Council of Chiefs v. Airai State Gov't*, 6 ROP Intrm. 198, 199, 201 (App. Div. 1997).

195. The title *Ngiraked* was awarded to Roman Tmetuchl in 1990 after both the *ourrot* and the traditional council approved his selection but remained in dispute. See *Matlab v. Melimarang*, 9 ROP 93, 94–98 (App. Div. 2002).

196. See *Ngara-Irrai Traditional Council of Chiefs*, 6 ROP Intrm. at 201.

197. *Id.* at 203; see also *supra* notes 73–74 and accompanying text (discussing compelling interests in candidate selection).

arithmetic mean. If the arithmetic mean from the data is a year (accounting for standard deviation), then an allotted time less than that amount moves closer to the governor's power in *Ngara-Irrai*. And the closer to *Ngara-Irrai*, the more likely it is that the means are not narrowly tailored. However, if the allotted time deviates beyond the arithmetic mean, then it is more likely that the state's means are narrowly tailored. The *ourrot* might counter that its case qualifies as an outlier because of certain novel facts, such as the lack of willing candidates. The state might then respond by arguing that it provides other avenues for resolution, such as offering a list of candidates or an opportunity to mediate. This is run-of-the-mill litigation in an adversarial system.

The advantage of the analogous framework is that it employs a modular approach: the subjective inquiry is decomposed into smaller and more manageable, objective components. On its face, the hypothetical's issue may be resolved by asking, Does this law greatly reduce the power of the *ourrot*? The analogous framework divides and conquers: Assuming the law in *Ngara-Irrai* was unconstitutional under the analogous framework, does this law share similarities to that law? If so, then considering these facts and the current normal course of *ourrot* selection, are the burdens imposed severe? If the burdens are severe, does the state have alternative means of accomplishing its interests? Are those alternatives feasible? If the burdens are not severe, can the state government function effectively without imposing that burden? Because courts do not have to address political theory questions, thereby reducing subjectivity concerns, the political thicket concern, while valid, is not entirely convincing.

To conclude, the analogous framework does not purport to be a way for courts to avoid the political thicket altogether. Instead, it aims to be a tool for breaking political theory questions into smaller, more objective inquiries. At present, Palauan courts do not have any such tool. Courts may either enter the thicket unequipped or forgo entering altogether, even if a remedy exists within. In the former, the court potentially loses its institutional power.<sup>198</sup> In the latter, the court provides no remedy without so much as an attempted search. The court's power remains where it was—a questionable conclusion, as the court has failed to resolve a possibly resolvable dispute<sup>199</sup>—and the claimant finds no relief. Under this conjecture, there are no gains, only potential losses. The analogous framework ensures that it is just that—a conjecture.

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198. See James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469, 471 (1989); cf. Jeffery J. Mondak, *Perceived Legitimacy of Supreme Court Decisions: Three Functions of Source Credibility*, 12 POL. BEHAV. 363, 363–64 (1990) (offering reasons why the Supreme Court's institutional legitimacy is not lost).

199. See Gibson, *supra* note 198, at 491 (discussing how the public complies with courts' rulings on political questions).

## 2. SEPARATION OF POWERS

As *Obeketang* demonstrates, disputes presenting the original problem may implicate issues that normally fall within a legislature's purview. In *Obeketang*, the dispute implicated the legislature's authority to determine its members' qualifications.<sup>200</sup> Under the analogous framework, a court may decide to seat a member even if the legislature determines that the member does not satisfy its qualifications. In so doing, the judiciary encroaches on the legislature's authority.

By encroaching on the legislature's authority, the judiciary potentially violates the political question doctrine. Following *Obeketang*'s reasoning, "[a] controversy is nonjusticiable . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving [the issue].'"<sup>201</sup> When the judiciary violates that doctrine, the court either (1) strays from its role of interpreting substantive constitutional provisions and determining their meaning<sup>202</sup> or (2) potentially makes an imprudent judgment about the proper exercise of judicial power, counter to democratic principles.<sup>203</sup> In both situations, the court loses its credibility as a neutral arbiter and, consequently, its institutional power.<sup>204</sup>

The problem with this argument is that it assumes that the political question doctrine applies in the first place. That was *Obeketang*'s reasoning, and it was incorrect for several reasons. First, *Obeketang* relied on only one factor of *Baker*'s test—the existence of a “textually demonstrable constitutional commitment”—to determine the political question doctrine's applicability.<sup>205</sup> But there are additional factors to determine applicability, most notably whether there are “judicially discoverable and manageable standards for resolving [the issue].”<sup>206</sup> As *Nixon v. United States*<sup>207</sup> held, if these two factors—the existence of a textually demonstrable commitment and the lack of judicially discoverable and manageable standards—are met, the political question doctrine applies.<sup>208</sup> However, what *Nixon* does not state is whether the doctrine

200. *Obeketang v. Sato*, 13 ROP 192, 195 (App. Div. 2006).

201. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

202. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19–20 (1959).

203. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 183–84, 188–92 (1962).

204. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 64–65 (1988).

205. *Baker*, 369 U.S. at 217.

206. *Id.*

207. 506 U.S. 224 (1993).

208. *Id.* at 228 (quoting *Baker*, 369 U.S. at 217).

applies when there are judicially discoverable and manageable standards in addition to a textually demonstrable constitutional commitment. Had the *Obeketang* Court considered this unsettled area, it would have had grounds to rule that the political question doctrine does not apply.

As Justice White stated in *Nixon v. United States*, “[T]he issue in the political question doctrine is *not* whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches. There are numerous instances of this sort of textual commitment . . . and it is not thought that disputes implicating these provisions are nonjusticiable.”<sup>209</sup> Given this fact, *Obeketang* was incorrect to assume that satisfaction of the textually demonstrable constitutional commitment factor was sufficient to establish the political question doctrine’s applicability.

Second, given that the political question doctrine’s applicability was uncertain to begin with, had the *Obeketang* Court considered the doctrine’s remaining factors, it would have found that a conclusion of applicability stood on thin ice. The court did not have to first make “an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>210</sup> Nor did the court have to answer a political question first.<sup>211</sup> Nor was there “an unusual need for unquestioning adherence to a political decision already made.”<sup>212</sup> And there was certainly no potential for “embarrassment from multifarious pronouncements by various departments.”<sup>213</sup>

Finally, and most importantly, there were judicially discoverable and manageable standards—the analogous framework. *Obeketang* was decided in 2006, fourteen years after *Burdick* and twenty-three years after *Anderson*.<sup>214</sup> Had the court dwelled longer on the issue, it would have found that the standards were being routinely applied and developed in American election law cases. Considering that such standards exist, it is likely that the political question doctrine does not apply to most cases implicating the analogous framework.

This discussion concludes by noting that the preceding sentence used the word “likely.” The term “likely” is used as a precautionary measure. At present, Palau is both a democracy just three decades young and a state over a millennium old.<sup>215</sup> Accordingly, the interplay between modern constitutional law and ancient tradition is still developing and in its early stages. It is not yet known whether future cases will nurture stronger

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209. *Id.* at 240 (White, J., concurring in the judgment).

210. *Baker*, 369 U.S. at 217.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Obeketang v. Sato*, 13 ROP 192, 195 (App. Div. 2006); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

215. ELIZABETH DIAZ RECHEBEI & SAMUEL F. MCPHETRES, HISTORY OF PALAU: HERITAGE OF AN EMERGING NATION 33, 356 (1997).

grounds for the political question doctrine's applicability. What is known, however, is that current law presents evidence against the latter.

The analogous framework is not without its faults. As critics and skeptics might find, because the framework applies to issues concerning one governmental institution's authority over that of another, there inevitably will be questions of a political nature. Opponents might further reason that those questions properly belong to the electorate or the legislature. These points are valid in the sense that they are properly deduced. They are weak, however, as points against applying the analogous framework. Any strong rebuttal employing such points must assume that a court cannot avoid answering those questions. But, as demonstrated above, answering such questions is not a necessary condition to applying the framework. At present, the only real concern is whether a court would be willing to do so.

#### CONCLUSION

Palauan law needs a framework to determine whether elected officials may fill traditional council vacancies. Since 1994, Palau has undergone rapid development. The country's limestone and dirt roads were transformed into asphalt in less than a decade.<sup>216</sup> More and more Palauans are moving abroad for economic opportunity, as immigrants from the Philippines, Bangladesh, and China flock to Palau for the same.<sup>217</sup> The country's demographics and economy are changing.<sup>218</sup>

With an increasingly diverse community, the number of, and homage to, Palauan traditions and customs will change. Many traditions will die out as community members cease practicing them or as Palauans leave the country. Given that members of traditional councils hold authority primarily because these practices remain, their gradual extinction slowly erodes the councils' authority. As that authority erodes, so, too, will the electorate's values on delineating power between state governments and traditional councils. With less of a role to play, Palau's electorate would have little incentive to maintain the status quo.

Should the status quo change, Palau's citizens will have a greater stake in determining whether the preservation of tradition merits the costs of halted legislation, infighting, and disputes within government. In some circumstances, Palau's courts can make that determination through stare

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216. See Donald R. Shuster, *The Republic of Palau and Its Compact, 1995–2009*, 44 J. PAC. HIST. 325, 325–26 (2009); Richard A. MacKenzie, *Impacts of Riparian Forest Removal on Palauan Streams*, 40 BIOTROPICA 666, 666 (2008).

217. Karen L. Nero, Fermina Brel Murray & Michael L. Burton, *The Meanings of Work in Contemporary Palau: Policy Implications of Globalization in the Pacific*, 12 CONTEMP. PAC. 319, 319–20, 322–23 (2000).

218. RECHEBEI & MCPHETRES, *supra* note 215, at 355–58; Nero, Murray & Burton, *supra* note 217, at 319–25, 348.

decisis and clear constitutional text. In others, precedent and constitutions will at best murmur an answer and at worst lay silent. It is in these circumstances that the courts are forced into cost weighing. The analogous framework guides that cost weighing with careful procedures.

Fortunately for the traditional councils, there is little cause for concern—that gradual extinction is indeed gradual. It is doubtful that councils will lose their roles or constitutional protections anytime soon, as most of Palau’s population is comprised of Palauans.<sup>219</sup> Where there is considerable cause for concern is an area of unsettled law with looming constitutional uncertainty. Sooner or later, Palau’s courts must address that uncertainty. This Comment hopes that when that time comes, there is a tool available for a court to use should it seek one.

This Comment concludes by returning to the first question: Can democracy coexist with tradition? True, modern Palauan democracy is of a Western mold; no elected legislatures existed in Palau before colonization.<sup>220</sup> But there is a precolonial tradition accounting for the “citizenry”: title holders are selected by the *ourrot* and approved by the *kloubak* (the traditional council).<sup>221</sup> As Palauan historians explain, this tradition ensures that the authority to politically empower a title holder is divided between the *ourrot* and the public.<sup>222</sup> If “the public” includes all eligible voters, democracy and tradition can coexist. Thus, at the risk of sounding cliché, the answer to the question is that it depends. Whom does “the public” include? With the discussion thus far, this question is left as an exercise for the reader.

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219. See OFF. OF PLAN. & STAT., BUREAU OF BUDGET & PLAN., *supra* note 12.

220. See Ngiraklsong, *supra* notes 20–21, at 909–10 and accompanying text.

221. See *supra* notes 40–43 and accompanying text.

222. See PALAU SOC’Y OF HISTORIANS, *supra* note 25.